Filed 7/24/20 P. v. Osband CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LANCE I'AN OSBAND, Defendant and Appellant.	C089290 (Super. Ct. No. CR74780)

A jury convicted defendant Lance I'an Osband of first degree murder in 1987, and the California Supreme Court affirmed the conviction in 1996. In January 2019, defendant filed a petition for resentencing under Penal Code section 1170.95[1] and requested the appointment of counsel. The trial court found that defendant was ineligible for relief and denied the petition without appointing counsel or holding a hearing.

Defendant appeals, arguing (1) he made a prima facie showing of eligibility for

[1] Undesignated statutory references are to the Penal Code.

resentencing, and (2) the trial court should not have made its determination without first appointing counsel.

Because the record clearly establishes that defendant is ineligible for resentencing, any error in failing to appoint counsel is harmless, and we will affirm the trial court's order denying the petition.

BACKGROUND

Following the 1985 killing of Lois Skuse, defendant was charged with first degree murder (§ 187) during a burglary (former § 190.2, subd. (a)(17)(vii)), robbery (former § 190.2, subd. (a)(17)(i)), and after raping her (former § 190.2, subd. (a)(17)(iii)), while personally using a deadly weapon, a knife, in the killing (former § 12022, subd. (b)(1)). (*People v. Osband* (1996) 13 Cal.4th 622, 652 (*Osband*).) He was further charged with burglary (§ 459), robbery (§ 211), and forcible rape (§ 261, subd. (a)(2)), and it was alleged that he personally used a knife in the commission of the robbery and rape (former §§ 12022, subd. (b)(1)) & 12022.3, subd. (a).) (*Osband*, at p. 652.) Defendant was also charged with attempting to murder Norma C. 16 days after he killed Skuse (§§ 187, subd. (a), 664.) He was also charged with the burglary of the classroom in which Norma C. was attacked (§ 459), with robbing her (§ 211), and with assaulting her with the intent to rape her (§ 220). (*Osband*, at p. 653.) Each of those four charges also carried allegations of infliction of great bodily injury (§ 12022.7) and personal use of a knife (former § 12022, subd. (b)). (*Osband*, at p. 653.) The trial court later struck the weapon-use enhancement allegations as to Norma C. (*Id.* at pp. 653, 701.)

The prosecution tried the case on the theory that defendant personally killed Skuse and that he was guilty of first degree murder under two theories: deliberate and premeditated murder or felony murder. (*Osband, supra*, 13 Cal.4th at p. 680.) The evidence against defendant included the following: (1) his palm print and fingerprints were found in several locations in Skuse's apartment; (2) the blood type derived from a semen sample found on Skuse matched defendant; (3) the blood types derived from blood

samples found on defendant's shoes matched both Skuse and Norma C.; and (4) track impressions consistent with defendant's shoes were found in several locations in Skuse's apartment. (*Id.* at pp. 654-657.) Defendant testified in his defense that he saw two men carrying a television leave Skuse's apartment and briefly went inside when he saw the door ajar but did not see anyone in the apartment. (*Id*. at pp. 657-658.) Defendant was identified by Norma C. for an attempted murder committed 16 days later with a similar modus operandi. (*Id.* at pp. 655-656.)

The jury was instructed that it could find defendant guilty of first degree murder "on a theory either of felony murder or of killing with malice aforethought, intent to kill, premeditation, and deliberation." (*Osband, supra,* 13 Cal.4th at p. 688.) The jurors were not instructed on aiding and abetting liability or the natural and probable consequences doctrine. As to the crimes against Skuse, the jury found defendant guilty on all counts and found all the allegations true. (*Id.* at p. 653.) As to the crimes against Norma C., the jury found defendant guilty on all counts and found the great-bodily-injury enhancements true. (*Ibid.*) He was sentenced to death. (*Id.* at p. 652.)

On appeal, defendant claimed the trial court erred by failing to instruct the jury that to find the felony-murder special circumstances true, it must find that he had the intent to kill. (*Osband, supra*, 13 Cal.4th at p. 679.) The Supreme Court agreed that the trial court's failure to instruct on intent to kill was error under *Carlos v. Superior Court* (1983) 35 Cal.3d 131, but found the error harmless beyond a reasonable doubt. (*Osband*, at pp. 681-684.) The court concluded "that the method of killing 'would preclude any inference [that it] was accidental or unintentional' [citation]; rather . . . 'the only reasonable conclusion the jury could have drawn was that defendant' [citation] intended to kill." (*Id.* at p. 681.) The court reasoned that "no reasonable jury, properly instructed under *Carlos*, would have failed to find intent to kill based on the evidence in this case," which included a deep stab wound to Skuse's neck, the fact she was stabbed while lying face down defenseless on the floor, and the "brutality of the assault" involved "force far

in excess" of what was necessary to complete the other crimes of burglary, robbery, and rape. (*Id.* at pp. 682-683.) The court stated, "While we do not know when defendant obtained the murder weapon from the kitchen and carried it into the bedroom, the medical evidence establishes to a near certainty that he harbored lethal intent at the moment he used the knife." (*Id.* at p. 682.) Finally, the court reasoned that because the jury found defendant intended to kill Norma C. in finding him guilty of attempted murder and because the crimes were very similar and committed in close succession, it was "improbable that the jury would have found that he intended to kill Norma C. but that he did not intend to kill Skuse" (*Id.* at p. 683.)

On January 31, 2019, defendant filed a pro se "Youthful Offender Prisoner" notice, citing Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437) and section 1170.95, for resentencing on the murder conviction. In the petition, defendant averred that a complaint or information had been filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine, and he had been convicted of murder under one of those theories; he did not specify in the petition which theory applied. Defendant asserted there was no proof he killed Skuse He did not assert any new facts or evidence to support his petition. He requested that the trial court appoint him counsel for the resentencing proceeding.

The trial court summarily denied the petition without first appointing defendant counsel as requested. It concluded defendant failed to make a prima facie showing of eligibility for resentencing because the California Supreme Court determined he was "the actual killer" and "acted with intent to kill, beyond a reasonable doubt." The trial court observed: "Even under [Senate Bill] 1437, Penal Code §§ 187 and 189 still provide for first degree murder based on a felony-murder theory, when the defendant was the actual killer or acted with intent to kill." The trial court concluded that because the Supreme Court found defendant acted with intent to kill and because defendant was on death row

under sentence of death and his conviction had not been overturned, "the issue of whether he was the actual killer or acted with the intent to kill is now law of the case [citations], and will not be revisited in a Penal Code § 1170.95 proceeding." The trial court denied the petition for resentencing and defendant filed a timely appeal from that order.

Defendant also filed with the trial court a response to the trial court's order, which the trial court deemed a request to commute defendant's sentence and grant him a hearing to present evidence relevant to a youthful offender parole hearing under *People v. Franklin* (2016) 63 Cal.4th 261. The trial court ruled it had no authority to commute defendant's sentence and that defendant was not entitled to a *Franklin* hearing because he was sentenced to death and would never be eligible for parole. Defendant did not appeal from that subsequent order.

DISCUSSION

I

Defendant first contends he made a prima facie showing of eligibility for resentencing under section 1170.95. We disagree.

Senate Bill 1437, which became effective on January 1, 2019, revised the felony-murder rule in California "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) The bill amended section 188, which defines malice, and section 189, which defines the degrees of murder to address felony-murder liability; it also added section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in the law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2-4; *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 417; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134, review granted Mar. 18, 2020, S260598 (*Lewis*).)

Section 1170.95, subdivision (c) provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

To make a prima facie showing, all three of the following conditions must apply:

"(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

"(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

"(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).)

As relevant here, section 189 was amended to include new subdivision (e), which provides: "(e) A participant in the perpetration or attempted perpetration of a felony [including rape, robbery, and burglary] in which a death occurs is liable for murder only if one of the following is proven:

"(1) The person was the actual killer.

"(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

"(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Stats. 2018, ch. 1015, § 3.)

In *People v. Verdugo* (2020) 44 Cal.App.5th 320, 330, review granted Mar. 18, 2020, S260493 (*Verdugo*), the court of appeal held that the trial court, in evaluating a petition under section 1170.95, should determine from all readily ascertainable information "whether there is a prima facie showing the petitioner falls within the provisions of the statute." The court reasoned: "Although subdivision (c) does not define the process by which the court is to make this threshold determination, subdivisions (a) and (b) of section 1170.95 provide a clear indication of the Legislature's intent. . . . [S]ubdivision (b)(2) directs the court in considering the facial sufficiency of the petition to access readily ascertainable information. The same material that may be evaluated under subdivision (b)(2) -- that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable -- should similarly be available to the court in connection with the first prima facie determination required by subdivision (c)." (*Verdugo*, at p. 329.) The court further held that the superior court should examine not only "the complaint, information or indictment filed against the petitioner; the verdict form or factual basis documentation for a negotiated plea; and the abstract of judgment," (*Id.* at pp. 329-330) but also any "court of appeal opinion, whether or not published, [because it] is part of the [defendant's] record of conviction." (*Id.* at p. 333; see *Lewis, supra*, 43 Cal.App.5th at p. 1138, review granted [allowing the trial court to consider its file and the record of conviction is sound policy].)

Defendant's petition attached the judgment, an amended minute order reciting the judgment, and his own declaration asserting he was not the actual killer. But the California Supreme Court's opinion in this case, which is part of the record of conviction, precludes a finding of eligibility for resentencing. (See *Verdugo, supra*, 44 Cal.App.5th at pp. 329-330, 333, review granted.) The trial court properly denied defendant's petition

for resentencing because the Supreme Court determined defendant was both the actual killer and acted with intent to kill when he murdered Skuse (*Osband, supra*, 13 Cal.4th at pp. 652-653, 680-681, 691-692, 737.)

Nevertheless, defendant argues the Supreme Court failed to adequately consider the possibility that he was not the perpetrator of the murder but instead an aider and abettor. His argument is unavailing. Although he is entitled to have the change in law applied to the facts of his case, he is not entitled to relitigate those facts. He therefore cannot make a prima facie showing that he "could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(3).) He was both the actual killer and acted with intent to kill within the meaning of section 189, subdivision (e).

II

Defendant further claims the trial court should not have denied his petition without first appointing counsel for him. He argues section 1170.95 requires the trial court to appoint counsel when requested by the defendant, and that the trial court must then permit the parties to file additional documents before determining whether the defendant has made a prima facie showing of eligibility. The People counter that section 1170.95 authorizes a trial court to make the initial determination of prima facie eligibility before appointing counsel and holding a hearing on the petition.

Although at least two courts have held that the duty to appoint counsel under section 1170.95, subdivision (c) does not arise until after the court determines the petitioner has made the required prima facie showing (See *Verdugo, supra*, 44 Cal.App.5th at p. 330, review granted; *Lewis, supra*, 43 Cal.App.5th at pp. 1138-1140, review granted), we need not decide the question because on this record, any error in failing to appoint counsel was harmless beyond a reasonable doubt. As we have explained, denial of the petition is dictated by the California Supreme Court's decision in this case, which held that defendant was the actual killer and harbored the intent to kill.

Thus, defendant did not fall within section 1170.95's resentencing provision because he could be convicted of first degree murder under section 189 as amended by Senate Bill 1437. (§ 189, subd. (e).) Even if the trial court had appointed counsel, defendant would be ineligible for resentencing.

Defendant argues the trial court should have given him the opportunity to prove he was not the actual killer. But as we have explained, defendant may not now relitigate that finding. Under the circumstances, the trial court's failure to appoint counsel was harmless beyond a reasonable doubt. (See *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58, review granted Mar. 18, 2020, S260410.)

DISPOSITION

The order denying the petition is affirmed.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
HOCH, J.